in contract the question is whether the breach has been committed within the local jurisdiction. At page 143 Lord Hodson L.J., said —

"... The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been been committed in the United Kingdom;"

At page 145 Ormerod L.J., concurring with the judgment of Hodson L.J., observed as follows —

"... Counsel for the defendants at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under R.S.C., Ordinance 11 rule 1 should be administered with the greatest care, as it is a rule which tends to encroach on the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction."

In the present case it is my considered judgment that for reasons that I have stated, the breach of contract, if any, has not been committed within this court's local jurisdiction. I would therefore allow the application and set aside the service of the writ with costs.

Application allowed.

Solicitors: *Chin, Sethu & Co.; Allen & Gledhill.*

SEET SOH NGOH v. VENKATESWARA SDN. BHD. & ANOR.

[O.C.J. (Chang Min Tat J.) October 15, 1975]
[Kuala Lumpur — Civil Suit No. 1611 of 1974]

Contract — Agreement to build and sell — Purchaser claiming for specific performance — Progressive payments at various stages made by purchaser — Developer claiming for payment in excess of what it was entitled to at material time — Whether developer could repudiate agreement.

Injunction — Registration of transfer to 3rd party — Prevention of — Registrar of Titles may be ordered to lodge caveat — Whether damages adequate remedy — Court to preserve status quo — National Land Code, ss. 319 & 320(1)(a).

The plaintiff purchased a piece of land from the first defendant, the developer, who contracted to build a house on it. It was agreed between the plaintiff and the first defendant that progress payments were to be made by the plaintiff at various stages of the building. At the material time, the plaintiff had paid to the first defendant more progress money than it was entitled to. The first defendant sought to repudiate the agreement on the ground that the plaintiff had no money to complete the purchase.

The plaintiff filed an action for specific performance of the said agreement and various orders of injunction to prevent the registration of the transfer of the property to a third party. The Registrar of Titles was joined in as the second defendant. The plaintiff obtained an order for injunction against both the first and second defendants and further orders requiring the second defendant to lodge a Registrar's caveat. The first defendant sought to set aside the said injunctions.

Held: (1) section 320(1)(a) of the National Land Code empowers the Registrar of Titles to enter his caveat to prevent fraud and improper dealing, and if such a possible dealing is brought to the notice of the court and the Registrar is before the court, the court can order him to do so;

(2) the first defendant had no right to repudiate the agreement and rely on a cause (that the purchaser had no money to complete the purchase) which had not arisen;

(3) damages would not be an effective remedy having regard to the tremendous increase in the value of land and the costs of construction and in the circumstances if would be prudent to preserve the *status quo;*

(4) the respective orders for injunction and for Registrar's caveat will stand and the first defendant will pay costs of the application to the plaintiff.

Cases referred to:-

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 2 W.L.R. 316 H.L.(E).

(2) *Fellowes & Son* v. *Fisher* [1975] 3 W.L.R. 184 C.A.

CIVIL SUIT.

M. L. Chan for the plaintiff.

Sri Ram for the first defendant.

Mohamed Saari bin Yusof (Federal Counsel) for the second defendant.

Chang Min Tat J.: This action is for specific performance of an agreement to build and sell a house together with the land on which it is to be built. It is one of several against the developer.

The short facts of the case are this:

Both parties entered into a written agreement of sale. By the terms of the agreement the payments were regulated as follows:

(1) On the execution of the agreement a sum of $5,000;

(2) On the commencement of the foundation a sum of $2,000;

(3) On the commencement of brick-works a sum of $2,000;

(4) On the commencement of roof-works a sum of $2,000;

(5) On the commencement of plastering a sum of $2,000;

(6) On the commencement of painting a sum of $2,000; and

(7) On the commencement of the water and electrical installation a sum of $2,000.

These progress payments added up to $17,000. The total purchase price was $33,000, the balance of $15,000 being payable on the completion of the building. However, at the relevant time the plaintiff had paid a total sum of $18,500 even though as is alleged in the Statement of Claim, the brick-works had just been commenced and the developer was not entitled at this stage to more than $9,000. If there had been any variations so far agreed in the methods of payment they had therefore been made for the benefit of the developer.

On the November 21, 1974, the developer addressed a letter to the plaintiff in the following terms:

"We are now at the commencement of roofing and water pipe installations. We therefore shall be pleased if you will kindly forward us $10,000 towards the above shophouse within (7) days from date hereof. We are to inform you that as materials have to be bought for cash your prompt payment shall be much appreciated."

Consequent on the receipt of this letter, the plaintiff telephoned Miss Kamala Devi, a Director of the firm and also an Advocate and Solicitor of the High Court of Malaya. What that conversation was about is a matter of some dispute.

The plaintiff said she protested that the time was not ready for the payment of the balance of $15,000 or any part thereof and definitely not for the payment of $10,000 as demanded. The developer contended that Miss Devi was advised by the plaintiff that she had no money to pay for the shophouse. Miss Devi then addressed the following letter to the plaintiff:

"We refer you to our registered letter dated November 21, 1974 and your telephone conversation with the writer when you informed us that you have no money to pay towards the shophouse at present and that you do not intend to pay for the above shophouse for another 2 months. We therefore refer you to clause 19 of the Agreement dated August 7, 1972 and return herewith the $18,500 received by us from you towards the above shophouse and cancel the said Agreement."

Clause 19 of the Agreement of Sale is in the following words:

"In the event of the vendors being unable to perform that part of their obligation of this agreement they shall refund whatever sums received by them to the purchaser whereupon this agreement shall become null and void and compensation costs or interest will not be payable and the purchaser shall accept the same in full satisfaction of all claims under this agreement."

It will be seen that clause 19 is a break clause giving the developer the right to cancel the agreement if it was unable to perform any part of the obligation in the agreement. The reference in Miss Devi's letter to this particular clause is therefore not apposite, or correct.

During the hearing reference was made to clause 18 which is in these words:

"In the event of the purchaser being unable to perform that part of his obligation of the agreement the purchaser shall give one month's written notice to the vendors that he is unable to perform his part of the obligations, and at the expiry of the said period of one month the vendors shall have the privilege to refund to the purchaser whatever amount paid by him whereupon this agreement shall become null and void and compensation costs or interests shall not be payable and the purchaser shall accept the same in full satisfaction of all claims under this agreement."

But clearly clause 18 is again not applicable. It is only applicable if the purchaser is unable to perform "that part" of his obligation. Indeed the only obligation that she had to perform was the payment of the balance. She had paid more than she had contracted to pay and therefore she had nothing to pay until the house was completed. That fact alone should be sufficient to give the lie to Miss Devi's contention or allegation that the plaintiff told her that she was unable to pay. The plaintiff was under no obligation to pay or to comply with the demand.

In so far as her inability to pay is concerned, the plaintiff had immediately on receipt of the letter purporting to terminate her contract dated December 5, instructed her solicitors by a letter of December 9 to refute the allegation and deny the developer's right to cancel the contract.

An interesting fact was revealed by Miss Chan for the plaintiff. That was that even prior to the purported termination of the contract dated December 5, the developer had presented at the Registry of Land Titles a transfer of the property and the house to a third party.

In these circumstances the plaintiff filed an action for specific performance of the agreement of sale and various orders of injunction for the purpose of preventing the registration of the transfer of the property in question to the second purchaser or any other person. The plaintiff also joined in the Registrar of Titles. At the time of filing the action the plaintiff also made an application (*ex-parte*) for injunctions against the first defendant, the developer and the second defendant, the Registrar of Land Titles. She obtained an order for an injunction against the first defendant and second defendant and also further orders requiring the second defendant to lodge a Registrar's Caveat and other orders consequential on this order. There was liberty to apply. Consequent on this liberty the developer's solicitors applied to set aside the injunction against it and instigated, if I may use that word without any adverse connotation, the second defendant to make a similar application.

In so far as the second defendant is concerned it is conceded by Miss Chan for the plaintiff that by reason of section 29 of the Government Proceedings Ordinance, an order of injunction cannot lie against the Registrar of Land Titles. On this concession the particular order of the High Court dated December 26, 1974 granting an injunction against the Registrar of Land Titles must be discharged and I so order.

As for the order of an injunction against the developer, Mr. Sri Ram did not seriously contend against it. Apparently he thought that the order was only effective as to any act to be done by the developed from the time of the order until such further order as the court might make. He did not think it would prevent the developer from proceding with the registration of the transfer to the second purchaser. He also did not consider that it required the developer to do any act such as to withdraw the transfer in the Registry. These are matters that did not really concern me. It is not within my competence, nor is it my proper duty to advise the developer what it might or might not do in order to avoid being in contempt of court.

Mr. Sri Ram however objected strongly to the retention of the order requiring the Registrar to lodge his caveat. Federal Counsel who appeared for the Registrar did not argue very much one way or the other. He had also not made any application for the discharge of the Registrar from the action.

The point of the developer's objection is that if it was upheld and either presuming that the developer is right in believing that proceeding with the registration of the transfer to the subsequent purchaser now lodged in the Registry is not in contempt of the order for an injunction or if the developer was willing to go ahead with the registration and take any punishment that might be meted out for contempt, then it would be able to discharge all its liabilities to this purchaser and meet the plaintiff's claim with the bland defence that the subject-matter of his complaint had already been disposed of. To say the least, for justice to operate there must be adjudication on the merits and this in turn must mean the preservation of the subject-matter of the dispute within certain limits. Moreover in this case, the Registrar was validly before the

court. He had the opportunity of being heard and he was heard. He had submitted himself to the court's jurisdiction.

Mr. Sri Ram, however, argued that on a proper reading of section 319 of the National Land Code dealing with a Registrar's Caveat, the Registrar was the only person who could decide whether to enter his Caveat. His contention was that there was no power in anyone, not even the court, to order him to do so. I do not accept that. Section 320(1)(a) empowers the Registrar to enter his Caveat for the prevention of fraud and improper dealing and if such a possible dealing is brought to the notice of the court and the Registrar is before the court, I see no reason why the court cannot in such a case order him to do so.

Let us remind ourselves what this case is all about. We have here a developer who had sold a piece of land to and contracted to build a house on it for a purchaser. It had received more progress money than it was entitled to. Even then, it made a demand for considerable more money, in fact, for the greater part of the balance outstanding, long before it was due to be paid. This sum or any part of it was not payable before the completion of the construction, and the construction was nowhere near completion. When it was refused, the developer resorted to an allegation which could hardly be true that the purchaser had now no money to complete the purchase. Even if true, it had no right to repudiate or terminate the contract; because it could not rely on a cause which had not arisen. It could not say to the purchaser: I terminate your contract now because you cannot now pay me a sum which I admit is not yet due. But, strangely, in the meantime, it had, clearly even before the demand was made to the plaintiff (I would say, long before, since the process of finding another purchaser, negotiations and finalisation must necessarily take some time) contracted to sell the same property to another purchaser, obtained presumably the full purchase, signed the transfer and presented it to the Registry for registration. And this sale was of a house by a developer who had NOT completed the construction of it.

To add to these bizarre circumstances, I was told by Mr. Sri Ram from the Bar that the second sale was at the same price. It is difficult to understand why the developer should invite an inevitable suit against it for no additional financial gain.

On these facts, Federal Counsel was clearly acting conscionably in not resisting the order for a Registrar's Caveat. He must be bearing in mind that the question of the developer's contempt of court was not a matter to concern the Registrar and that without such an order as the order for the Registrar's Caveat there would be nothing to stop the process of registration. Similarly if the court is also to act in conscience, it must direct the Registrar to enter his Caveat, since that is the only means to preserve the subject matter of the dispute between the parties.

The question, then, is: should the developer be allowed to get away with it, save as to the question of damages? I think not. Having regard to the tremendous increase in the value of land and in the costs of construction during the past four years, I very much doubt, at this stage, but of course always subject to persuasion by Counsel, that damages are an effective or any real remedy. In view of the doubt as to the adequacy of monetary damage, it would surely be prudent, indeed necessary, to preserve the status quo: see *American Cyanamid Co.* v. *Ethicon Ltd.*[1] And for good measure, surely there are also in the present case several "special factors" within the ambit of Lord Diplock's speech in the *American Cyanamid's* case at page 324 or at the same page "uncompensatable disadvantages", as applied by Lord Denning M.R. in *Fellowes & Son* v. *Fisher*[2] to let the state of things remain as it is.

The order for an injunction will therefore stand as will the order for the Registrar's Caveat. The developer will pay the costs of this application to the plaintiff.

Order accordingly.

Solicitors: *Nik Hussein, Ibrahim, Tan & Abdullah; Sri Ram; Chan & Chia.*